United States Court of Appeals,
Second Circuit.

UNITED HAULERS ASSOCIATION, INC., Transfer Systems Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup Inc.,
Plaintiffs-Appellees,

v.

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY,
County of Oneida and County of Herkimer,
Defendants-Appellants.

Docket Nos. 00-7593, 00-7595 and 00-7597.

Argued Dec. 19, 2000.
Decided July 27, 2001.

Before: MESKILL, LEVAL and CALABRESI, Circuit Judges.

MESKILL, Circuit Judge:

Defendants-appellants Oneida-Herkimer Solid Waste Management Authority (Authority) and the Counties of Oneida and Herkimer (Counties) appeal a March 31, 2000 order of the United States District Court for the Northern District of New York, Pooler, *Circuit Judge* sitting by designation, granting summary judgment in favor of plaintiffs-appellees United Haulers Association, Inc., Transfer Systems, Inc., Bliss Enterprises, Inc., Ken Wittman Sanitation, Bristol Trash Removal, Levitt's Commercial Containers, Inc. and Ingersoll Pickup, Inc. (collectively "United Haulers") with respect to

defendants' liability under 42 U.S.C. § 1983, enjoining the enforcement of the Counties' solid waste laws and declaring those laws unconstitutional under the Commerce Clause.

We must decide whether the Counties' so-called "flow control" ordinances, which require that all waste generated within the Counties be delivered to one of five publicly owned facilities, are unconstitutional under the Commerce Clause. The district court found the flow control laws "virtually indistinguishable from the laws examined and struck down" in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (*Carbone*), and *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir.1995), and, therefore, held that the ordinances were unconstitutional.

We hold that because the favored facilities are publicly owned, the ordinances do not discriminate against interstate commerce, and therefore are not subject to the rigorous test set forth in *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986). We remand to the district court to consider whether the ordinances impose burdens on interstate commerce that are clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

BACKGROUND

The history of local solid waste regulation in the state of New York and across the country has been well documented. *See, e.g., Inc. Vill. of Rockville Ctr. v. Town of Hempstead*, 196 F.3d 395, 396-98 (2d Cir.1999); *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788, 791-92 (3d Cir.1995). Thus, we only briefly discuss the events that prompted the Counties to implement their waste management scheme.

Historically, each city, town or village within the Counties was responsible for its own waste management. This

balkanization led to the proliferation of waste dumps of all sizes, and with varying degrees of environmental accountability. The environmental risks and liabilities became apparent in the 1980s when over 600 local businesses and several local municipalities and school districts were named as third-party defendants in a federal environmental clean-up action against the Ludlow Landfill in Oneida County. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

This "solid waste crisis," as Oneida County describes it, and the increased environmental risks and exposure to federal and state liability which flowed from it, prompted the Counties to seek a solution. Like many of their municipal neighbors in New York and throughout the country, the Counties devised a comprehensive waste management system in an attempt to provide for the safe and cost effective disposal of their residents' solid waste. Like many of their municipal neighbors, the Counties' plan is now the subject of a constitutional challenge.

A. *The Counties' Solid Waste Management Solution*

Oneida and Herkimer Counties are located in central New York, in the Mohawk Valley, and together encompass over 2,600 square miles with a combined population of approximately 306,000 persons, residing in 78 different cities, towns and villages. Both Counties are municipal corporations of the state of New York, and together constitute a single "planning unit" under the New York State Solid Waste Management Plan and its authorizing legislation. *See* N.Y. Envtl. Conserv. L. § 27-0107(1)(a).

In late 1987, the Counties entered into a municipal contract for the purpose of coordinating and consolidating the management of their solid waste. To that end, they hired a consulting firm to prepare an environmental statement and solid

waste management plan. The statement and plan contemplate the construction of six facilities collectively to manage the Counties' solid waste: a recycling center, a compost facility, a transfer station, a waste-to-energy plant, an ash landfill and a C & D (construction and demolition) debris landfill. The estimated cost of these facilities was $155-200 million.

The Counties requested that then-Governor Cuomo and the New York State Legislative Commission on Solid Waste Management (Commission) create a waste management authority to assume the Counties' joint waste management responsibilities. The Governor and Commission complied by creating the Authority, a public benefit corporation authorized by the Oneida-Herkimer solid waste management authority act of 1988(Act). *See generally* N.Y. Pub. Auth. L. § 2049-aa. The Authority has the power, among other things, to collect, process and dispose of solid waste generated in the Counties. Moreover, the Act permits the Counties to contract with the Authority to obligate the Counties to ensure the continued operation and solvency of the Authority. *See id.* at §§ 2049-ee and tt. As amended in 1990, the Act prohibits the Authority from accepting solid waste (other than recyclable material) from outside of the Counties. *See id.* at §§ 2049-ee(4) and (7).

1. *Agreements Between the Counties and the Authority*

On May 10, 1989, the Authority and the Counties entered into a Solid Waste Management Agreement, in which the Authority agreed to manage and dispose of all solid waste within the Counties. In particular, the Authority agreed to take control of the operation of the Oneida County Energy Recovery Facility and the Oneida-Herkimer Recycling Center (Recycling Center) beginning on January 1, 1990, and to collect "tipping fees" sufficient to pay its operating and maintenance costs. *See SSC Corp.*, 66 F.3d at 505 n. 5 (describing "tipping fee" as an industry term for a disposal charge or gate fee). The Authority

assumed the Counties' regulatory powers with regard to private haulers operating within the Counties. For their part, the Counties agreed to direct all recyclables to the Recycling Center and agreed to direct all solid waste generated in the Counties to facilities designated by the Authority.

On December 28, 1989, the Authority and the Counties entered into a second solid waste management agreement. In that agreement, the Authority reaffirmed its obligations under the first agreement and the Counties agreed to pay the Authority's operating costs and debt service to the extent those costs were not recouped through tipping fees and other disposal related charges.

2. *The Local Laws*

In December 1989, the Oneida County Board of Legislators enacted Local Law No. 1 of 1990, Oneida's flow control law. The law requires that all solid waste generated within the County be picked up by the municipality, a licensed private hauler or the generator, and delivered to certain approved processing sites designated by the Authority.[1] Accordingly, private haulers must obtain a permit from the Authority to pick up solid waste in the Counties. Failure to deliver that waste to the designated facilities subjects the

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[1] Section 2(a) of the Oneida Local Law provides:

> In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator *to a disposal location approved by the County.*

(emphasis added).

private hauler to revocation of its permit, fines and imprisonment.

Two months later, in February 1990, the Herkimer County Legislature enacted Herkimer County Local Law No. 1 of 1990, Herkimer's flow control law, which is substantially similar to the Oneida flow control law.[2]

3. *Authority Activities*

Between 1990 and 1992 the Authority issued over $51 million in bonds to finance the designated facilities, to construct the Green Waste Compost Facility and the Utica Transfer Station, and to refinance prior bonds. The Authority owns all five designated facilities and operates all but the Utica Transfer Station.

a. *Utica Transfer Station Operating Agreement*

In 1991, the Authority accepted bids for the operation of the Utica Transfer Station. The bidding process was open to all private waste disposal companies, in-state and out-of-state. The Authority received four bids, all from out-of-state businesses, which proposed delivery of the solid waste at the transfer station to eight landfills, seven of which were located outside of New York.

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[2] Section 2(c) of the Herkimer Local Law provides:

> After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material *shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.*

(emphasis added).

In June 1991, the Authority entered into a contract with Empire Sanitary Landfill, Inc. (Empire) to operate the Utica Transfer Station. Pursuant to that contract, Empire transported all solid waste processed at the transfer station to Empire's landfill in Taylor, Pennsylvania for disposal. The Authority agreed to deliver or cause to be delivered all solid waste generated or originating in the Counties (other than recyclables and waste burned at the Energy Recovery Facility) to the transfer station. The parties extended the contract to span the period 1995 to 1998.

In 1998, the Authority again accepted bids from private waste disposal companies. This time, Waste Management of New York (Waste Management), a Delaware limited liability company, prevailed. Waste Management agreed to dispose of the waste processed at the transfer station at two facilities, one located in-state and the other located in Erie, Pennsylvania. Waste Management continues to operate the transfer station on behalf of the Counties.

In the May 20, 1991 Final Local Solid Waste Management System Plan for the Counties, the Authority contemplates the development of additional facilities "to provide for *all* components of the waste stream for all residents of the two counties" (emphasis added). The Authority expressly states in the Plan that it "is wholly committed to the development of facilities within Oneida and Herkimer Counties to provide for the region's long-term needs." In other words, the current out-sourcing of the transfer station's operation is a temporary measure until the Authority brings into operation a County landfill, the last of the six facilities contemplated in the original environmental plan, and is otherwise able to meet all of the Counties' solid waste management needs.

b. *The Authority's Rules and Regulations*

Pursuant to the May and December 1989 agreements and the local flow control laws enacted by the Counties, the Authority has promulgated rules and regulations. The Authority's 1995 Rules and Regulations provide that private haulers "must deliver all acceptable solid waste and curbside collected recyclables generated within Oneida and Herkimer Counties to an Authority designated facility." The 1995 Rules and Regulations also require all private haulers to obtain a Solid Waste Collection and Disposal Permit from the Authority. The Authority sets the applicable tipping fees, designates access route patterns to four of the five designated facilities and retains the right to redirect "solid waste . . . to the appropriate facility according to waste production, waste origin, waste type, seasonal fluctuations or planned operating procedures." To enforce the Counties' local laws and the 1995 Rules and Regulations, the Authority employs "garbage cops" (as coined by United Haulers) to monitor private haulers' activities and ensure compliance with the flow control ordinances.

B. *Alleged Effect on Private Haulers*

The individual plaintiff haulers are four New York corporations and two New York sole proprietorships, each of which engaged in the collection, transport, processing and disposal of solid waste within the Counties. United Haulers Association, Inc. (Association) is a not-for-profit New York corporation comprised of solid waste management companies doing business within the Counties. Each of the individual plaintiffs is a member of the Association.

Under the 1995 Rules and Regulations, private haulers must pay the Authority a tipping fee of at least $86 per ton of solid waste disposed of at the Authority's facilities. If witnessed disposal is required or if the load contains more than 25% recyclables, the charge is increased to as much as $172 per

ton. Even the lowest tipping fee charged under the Counties' scheme is higher than the market value for the disposal services the Authority provides. But for the Counties' flow control laws, United Haulers claims that it could deliver and dispose of solid waste at other facilities within the state of New York or in other states at a lower price. United Haulers submitted affidavits from Jeff Bliss, President of Bliss Enterprises, Inc. and David N. Levitt, Vice President of Levitt's Commercial Containers, Inc., averring that out-of-state disposal facilities accessible to the haulers charged significantly lower tipping fees. For example, United Haulers claims that Greentree Landfill in Pennsylvania is capable of accepting municipal waste from the haulers at a tipping fee of $26-30 per ton. Therefore, according to United Haulers, the Counties' flow control laws bar them from accessing a viable, and significantly cheaper, interstate market for waste disposal.

C. *District Court Proceedings*

On April 14, 1995, United Haulers commenced the present action against the Counties and the Authority alleging that the flow control laws are unconstitutional and constitute a deprivation of United Haulers' constitutional rights. *See* 42 U.S.C. § 1983.

Soon thereafter, United Haulers moved for summary judgment, seeking an order (1) declaring that the flow control laws unconstitutionally discriminate and/or unduly burden interstate commerce in violation of the Commerce Clause, (2) enjoining the Authority and the Counties from enforcing the flow control laws, (3) declaring that the Counties and the Authority deprived United Haulers of rights, privileges or immunities secured by the Constitution, and (4) holding the Counties and the Authority liable for damages and attorney's fees under 42 U.S.C. § 1988.

United Haulers argued, as it does now, that "the recent and controlling decision by the United States Supreme Court in *C & A Carbone, Inc. v. Town of Clarkstown* establishes the unconstitutionality of the Flow Control Laws." *United Haulers* asserted that, like the laws stricken in *Carbone*, the Counties' flow control laws discriminate against interstate commerce to finance the Counties' solid waste management scheme. United Haulers pointed out that the flow control laws in this case are designed to support a much larger waste management system (almost 50 times more expensive) than that in *Carbone* and impact approximately three times more solid waste than in *Carbone*.

In opposition, the Counties and the Authority argued that they had adopted "an integrated system of solid waste disposal" to alleviate "important public health and environmental concerns" caused by the hodge-podge system of private enterprise and sub-standard disposal sites. They argued that the waste management system did not discriminate against or unduly burden interstate commerce under *Carbone*. Alternatively, they argued that they were entitled to further discovery pursuant to Fed.R.Civ.P. 56(e) and (f) to enable them to show that there were no alternative means to accomplish their legitimate goals. In their view, anything less than full discovery would "reward[ ] plaintiffs for their guerilla litigation strategy and punish[ ] the [defendants] in contravention of the intent and spirit of the Federal Rules of Civil Procedure."

Shortly after United Haulers moved for summary judgment, the Counties and the Authority answered the Complaint and served an initial set of interrogatories. At a June 1, 1995 scheduling conference, however, United Haulers requested a protective order staying discovery pending resolution of its motion. The magistrate judge granted the protective order suspending discovery. Accordingly, no discovery took place prior to the district court's determination

of United Haulers' summary judgment motion that is the subject of this appeal.

The district court heard oral argument on United Hauler's motion for summary judgment in October 1995. Almost five years later, on March 31, 2000, the district court entered an order granting United Haulers' motion. The district court declared the flow control laws unconstitutional and enjoined the Counties and the Authority from enforcing them. After concluding that the Association did not have standing to assert a section 1983 damages claim, the district court granted summary judgment in favor of the individual haulers on that claim and referred the action to a magistrate judge for calculation of damages.

The Counties and the Authority filed timely notices of appeal on April 28, 2000. We heard argument on December 19, 2000, and following argument solicited supplemental briefing from the parties on several issues. We now reverse and remand.

DISCUSSION

In 1996, we remarked that the federal docket was "clogged with—of all things—garbage." *SSC Corp.*, 66 F.3d at 505. It remains so today. *See, e.g., Maharg, Inc. v. Van Wert Solid Waste Mgmt. Dist.*, 249 F.3d 544 (6th Cir.2001); *On the Green Apartments L.L.C. v. City of Tacoma*, 241 F.3d 1235 (9th Cir.2001); *see generally* Stanley E. Cox, *Garbage In, Garbage Out: Court Confusion about the Dormant Commerce Clause*, 50 Okla. L.Rev. 155, 156 (1997) (noting that garbage cases lie "on the cutting edge of dormant Commerce Clause theory").

Although the Supreme Court's and this Court's recent spotlight on local, solid waste regulation provides us with a framework within which to analyze this challenge, many questions remain unanswered with respect to the

constitutionality of municipal flow control laws. *See generally* Colin A. Fieman, *The Second Circuit Upholds Waste Management Systems in the Wake of* Carbone *v.* Clarkstown: *The Decisions in* USA Recycling, Inc. *v.* Town of Babylon *and* SSC Corp. *v.* Smithtown, 23 Fordham Urb. L.J. 767, 769 (1996) ("[A]lthough the Second Circuit has made considerable progress in clarifying the law in this area, it has left questions about the constitutionality of flow control unanswered."). Unfortunately, these missing pieces to the constitutional puzzle often force states and municipalities to engage in guesswork about the constitutionality of proposed solid waste management schemes, which are expensive and time-consuming to implement. *See generally, e.g.*, Jennifer M. Anglim, *Note, The Need for a Rational State and Local Response to* Carbone: *Alternate Means to Responsible, Affordable Municipal Solid Waste Management*, 18 Va. Envtl. L.J. 129, 130-32 (1999) ("[T]he federal municipal solid waste . . . management jurisprudence has followed intertwined and often-conflicting legal theories and precedents, making it difficult for states and municipalities to plan."). With frequent reference to the guiding principles underlying the Supreme Court's dormant Commerce Clause jurisprudence, we attempt to fill in one more piece of this puzzle.

A. *Legal Background*

The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. On its face, the clause does not speak to the power, if any, of the states to regulate interstate commerce. Although the Supremacy Clause prohibits state regulation of interstate commerce in areas where Congress has spoken, *see* U.S. Const. art. VI, cl. 2, neither the text of the Commerce Clause nor the Supremacy Clause "say what the states may or may not do in the absence of congressional action." *Dep't of*

Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734, 749, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) ("The Commerce Clause does not state a prohibition; it merely grants specific power to Congress. The prohibitive effect of the Clause on state legislation results from the Supremacy Clause and the decisions of this Court."). That question did not remain open for long.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824), Justice Johnson sowed the seeds for the "dormant" or "negative" Commerce Clause by arguing that the power to regulate interstate commerce could not rest with two sovereigns. *See id.* at 227 (Johnson, *J.*, concurring) (arguing that "since the power to prescribe the limits to . . . freedom [of commerce], necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive"); *see also id.* at 209 (Daniel Webster, as counsel, arguing that the Commerce Clause's affirmative grant to Congress "necessarily" prohibits local action that alters "what the regulating power designs to leave untouched"). In the years that followed, the Supreme Court consistently held that the Commerce Clause's affirmative grant of power to the federal government requires some concomitant limitation on the power of the several states. *See* Boris I. Bittker, *Regulation of Interstate and Foreign Commerce* § 6.01[A] (1999 & Supp.2001); *see also SSC Corp.*, 66 F.3d at 509 (noting that "federal courts have for more than 150 years invoked the Commerce Clause to scrutinize state regulations affecting interstate commerce").

Justice Jackson later expressed the rationale underlying the judicially created dormant Commerce Clause:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will

withhold his exports, and no foreign state will by customs duties or regulations exclude them.

H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949); *see Carbone*, 511 U.S. at 390, 114 S.Ct. 1677 ("The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."). Justice Jackson's "national market" has led to "material success . . . the most impressive in the history of commerce," *H.P. Hood & Sons*, 336 U.S. at 538, 69 S.Ct. 657, arguably because the Supreme Court "consistently has rebuffed attempts of states to advance their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state." *Id.* at 535, 69 S.Ct. 657. *But see* Edmund W. Kitch, *Regulation, the American Common Market and Public Choice*, 6 Harv. J.L. & Pub. Pol'y 119, 123-24 (1982) (challenging the practical efficiency resulting from the Court's dormant Commerce Clause jurisprudence).

Not surprisingly, the Court's effort to preserve a national market has, on numerous occasions, come into conflict with the states' traditional power to "legislat[e] on all subjects relating to the health, life, and safety of their citizens." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). On these occasions, the Supreme Court has "struggled (to put it nicely) to develop a set of rules by which we may preserve a national market without needlessly intruding upon the States' police powers, each exercise of which no doubt has some effect on the commerce of the Nation." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 596, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (Scalia, *J.*, dissenting) (citing *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 180-83, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995)); *see generally* Boris I. Bittker, *Regulation of Interstate*

and Foreign Commerce § 6.01[A], at 6-5 ("[T]he boundaries of the [State's] off-limits area are, and always have been, enveloped in a haze."). Those rules are "simply stated, if not simply applied." *Camps Newfound/Owatonna*, 520 U.S. at 596, 117 S.Ct. 1590 (Scalia, *J.*, dissenting).

B. *Dormant Commerce Clause Analysis*

As a threshold matter, a court must determine whether a state or local government is "regulating" and, if so, whether that regulation affects interstate commerce. *See Carbone*, 511 U.S. at 389, 114 S.Ct. 1677; *On the Green Apartments L.L.C.*, 241 F.3d at 1241-42.

The dormant Commerce Clause restricts certain state regulation of interstate commerce. It does not prohibit a state from participating in the free market if it acts like a private enterprise. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980) ("There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."); *Sal Tinnerello & Sons v. Town of Stonington*, 141 F.3d 46, 55 (2d Cir.1998). In general, a state regulates when it exercises governmental powers that are unavailable to private parties. *See SSC Corp.*, 66 F.3d at 512. Classic hallmarks of government regulation include the threatened imposition of fines and/or jail terms to compel behavior. *See id.* The Counties' flow control laws require private haulers to obtain a permit from the Counties and to deliver all waste to Authority designated facilities. Failure to do either exposes the private hauler to fines, revocation of its permit to pick up solid waste, and imprisonment. Therefore, the Counties have "avail[ed themselves] of the unique powers or special leverage [they] enjoy[ ] by virtue of [their] status as sovereign[s]," *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 399, and, thus, are regulating the market for waste collection and disposal.

The Supreme Court has left no doubt that flow control regulation affects interstate commerce. In *Carbone*, the Supreme Court stated that "[w]hile the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach." 511 U.S. at 389, 114 S.Ct. 1677. Although the Clarkstown ordinance differs from the Counties' laws in that it applied to solid waste originating outside of Clarkstown, the Court also noted that "even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step." *Id.*; *see On the Green Apartments L.L.C.*, 241 F.3d at 1241 ("While Tacoma's ordinance does not require that the local transportation of out-of-state waste be deposited at a site in the city, it does prevent waste from within the city from being deposited outside of the city."). As such, the Counties' flow control laws sufficiently affect interstate commerce to trigger a deeper dormant Commerce Clause review. As in *Carbone*, "[t]he real question is whether the flow control ordinance[s][are] valid despite [their] undoubted effect on interstate commerce." 511 U.S. at 389, 114 S.Ct. 1677.

1. *Discrimination or Incidental Effects*

Once a court determines that a state regulation affects interstate commerce, it must next determine whether the regulation "discriminates against interstate commerce" or regulates even-handedly with incidental effects on interstate commerce. *Id.* at 390, 114 S.Ct. 1677 (internal quotation marks and citations omitted); *see also Gary D. Peake Excavating v. Town Bd. of Hancock*, 93 F.3d 68, 73 (2d Cir.1996) ("The Supreme Court has established a two-step approach to determine whether a state or municipal law violates the dormant Commerce Clause.").

A local law is discriminatory if it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1281 (2d Cir.1995) (quotation marks omitted); *see also Sal Tinnerello & Sons*, 141 F.3d at 55. Where a plaintiff shows that a regulation is discriminatory, the burden shifts to the state or local government to demonstrate that the local benefits outweigh the discriminatory effects and that no nondiscriminatory alternative exists to effectuate the local goals. *See USA Recycling*, 66 F.3d at 1281-82. A discriminatory state or local regulation is virtually *per se* unconstitutional because of "the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, non-protectionist purpose." *Carbone*, 511 U.S. at 422, 114 S.Ct. 1677 (Souter, *J.*, dissenting); *see Gary D. Peake Excavating*, 93 F.3d at 74. In the rare case where a court finds the local interest compelling and the alternatives non-existent, it must uphold the challenged regulation. *See, e.g., Taylor*, 477 U.S. at 151, 106 S.Ct. 2440 ("Maine's ban on the importation of live baitfish serves legitimate purposes that could not adequately be served by available nondiscriminatory alternatives.").

On the other hand, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844; *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). Because this burden is far less demanding than the burden under *Maine v. Taylor*, the critical inquiry is often "whether [the local law] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate

local concerns." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978).

The district court held that the Counties' flow control laws discriminated against interstate commerce in favor of the Authority's designated facilities and that, in light of *Carbone*, the Counties could not, as a matter of law, demonstrate that no alternatives existed. The district court relied on its belief that "[c]ourts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause." (citing *Sal Tinnerello & Sons*, 141 F.3d at 56; *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 397). Accordingly, the district court did not reach the second line of inquiry, *i.e.* whether "the burden imposed [by the regulations] on [interstate] commerce [was] clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. We review the district court's determination on summary judgment *de novo*, applying the same legal standard as that used by the district court. *See Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 91 (2d Cir.2001). We disagree with the district court on several grounds.

First, the district court erroneously attributed to the Supreme Court a *per se* prohibition against flow control laws. *See Harvey & Harvey*, 68 F.3d at 798 ("That [an] ordinance requires the use of [a] selected facility, thus prohibiting the use of non-designated facilities (which may be out of state), does not itself establish a Commerce Clause violation."); *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir.1999) ("We do not interpret *Clarkstown* as explicating a broad-based ban on every flow-control ordinance that happens to be coupled with an exclusive contractual arrangement in favor of an in-state operator."). Unfortunately, the district court's misconception led it to deny the Counties discovery and essentially grant summary judgment without reference to the

unique facts of this case.[3] The Counties' flow control laws, like any other challenged ordinance, must be analyzed under the principles articulated in *Carbone* according to their unique facts. Second, and more importantly, the district court erred in its Commerce Clause analysis by failing to recognize the distinction between private and public ownership of the favored facility.

The following discussion focuses on the latter of these errors and concludes that a municipal flow control law does not discriminate against out-of-state interests in violation of the Commerce Clause when it directs all waste to publicly owned facilities. As such, the district court should have analyzed the Counties' flow control laws under the *Pike* test to determine whether the laws' effects on interstate commerce substantially outweigh the local benefits.

2. *Private Ownership vs. Public Ownership*

The Counties' waste management scheme creates a bottleneck. Within the bottle, private waste haulers compete for the opportunity to collect solid waste from individual and corporate generators located within the Counties. Once

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[3] In doing so, the district court also effectively foreclosed the Counties' ability to show that they had no reasonable alternatives to implementing flow control laws. Although *Maine v. Taylor* is the only example of a state meeting the strict burden imposed on a discriminatory regulation, district courts should allow localities an opportunity to make that showing. *See, e.g., Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth.*, 877 F.Supp. 935, 944 (M.D.Pa.1994) (denying plaintiffs' motion for summary judgment because the defendants' claim that there were no alternatives "raises a disputed issue of material fact"). Such an opportunity may require discovery into, and an examination of, the specific alternatives, if any, available to the locality, based on its unique geographical, practical and historical characteristics.

collected, the private waste haulers must deliver the waste to one of five designated, Authority-owned processing facilities located within the Counties, the "bottleneck." For the time being, once the waste has been delivered, private waste disposal companies, both in-state and out-of-state, stand outside the bottle to bid, on an open and competitive basis, for the right to process and ultimately dispose of the waste delivered to the Counties' transfer station. The parties do not dispute, in any relevant respect, how the Counties' system is organized, but instead disagree about whether the flow control restrictions on private haulers, those within the bottle, are discriminatory under the Commerce Clause.

The Counties and the Authority urge us to analyze the flow control ordinances as part of their overall waste management scheme. Specifically, they argue that the bidding process for the operation of the Utica Transfer Station negates any alleged hoarding of the disposal service because it opens the local disposal market to out-of-state bidders. *See, e.g.*, *Harvey & Harvey*, 68 F.3d at 801-02 (holding that selecting a favored facility or business with an open and fair bidding process that permits out-of-state competition comports with the dormant Commerce Clause). The district court, however, did not reach this aspect of the Counties' system. Furthermore, in several post-*Carbone* decisions, we severed our analysis of flow control ordinances from other aspects of a municipal waste management plan. *See, e.g.*, *Inc. Vill. of Rockville Ctr.*, 196 F.3d at 398-99; *SSC Corp.*, 66 F.3d at 512-13; *see also Huish Detergents v. Warren County*, 214 F.3d 707, 715 (6th Cir.2000). We do so here as well.

a. *Carbone*

Our analysis naturally begins with *Carbone*, the Supreme Court's only occasion thus far to apply the Commerce Clause

to a flow control ordinance. The Supreme Court was presented with the following setting.

The Town of Clarkstown, New York agreed with environmental authorities to close its landfill and build a solid waste transfer station. *See Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. "A local private contractor agreed to construct the facility," which the local contractor would own and operate for a period of five years. *Id.* The town thereafter agreed to buy the station back for one dollar. *Id.* To make the endeavor worthwhile, the contractor charged a set tipping fee for each ton of solid waste disposed of at the transfer station. The town guaranteed the transfer station a minimum yearly waste flow, which was intended to generate tipping fees sufficient to finance the cost of the facility. *See id.* at 412, 114 S.Ct. 1677. To meet the minimum tonnage guarantee, the town enacted a flow control ordinance that required all waste within the town to be delivered to the transfer station. *Id.* The purpose of the ordinance was to "finance [the] new facility with the income generated by the tipping fees." *Id.*

Clarkstown's ordinance differs from the Counties' ordinances in two significant respects. First, the Clarkstown ordinance applied to all solid waste within the town, whether that waste was generated within or outside the town. In contrast, the Counties' flow control ordinances apply only to waste generated within the Counties.[4] We do not rely on that

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[4] Carbone owned a recycling facility within the Town of Clarkstown, but a significant amount of its waste was collected in the state of New Jersey. The briefs and oral argument transcript reveal that Carbone challenged the ordinance only to the extent that its application to waste originating out-of-state increased the cost of disposal for New Jersey generators and subjected Carbone to inconsistent local regulations. *See C & A Carbone v. Town of Clarkstown*, 1993 WL 757637, at *18-19 (U.S. Dec. 7, 1993) (oral

distinction because, in *SSC Corp.*, we struck down a flow control ordinance as "indistinguishable" from the ordinance in *Carbone*, even though the challenged law, unlike *Carbone*, applied only to waste originating within the town. 66 F.3d at 514. Second, the Clarkstown ordinance differs from the Counties' ordinances because the transfer station in Clarkstown was owned by a "local private contractor." *Carbone*, 511 U.S. at 387, 114 S.Ct. 1677. The Counties' transfer station, as well as the other designated facilities, are publicly owned. This latter distinction is determinative.

The majority opinion in *Carbone* held that Clarkstown's flow control ordinance was "just one more instance of local processing requirements that [the Court] long [has] held invalid." *Id.* at 391, 114 S.Ct. 1677. Stated otherwise, the ordinance "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility,"in that case "a single local proprietor." *Id.* at 392, 114 S.Ct. 1677. The Court repeatedly referenced the private nature of the favored facility and repeatedly alluded to the dangers of allowing local government to favor local industry or a single local business over out-of-state competition. For example, the Court held that "the town may not employ discriminatory regulation to give [the designated facility] an advantage over *rival businesses* from out of State." *Id.* at 394, 114 S.Ct. 1677 (emphasis added). And again, "[s]tate and local governments may not use their regulatory power to favor *local enterprise* by prohibiting patronage of out-of-state competitors or their facilities." *Id.* (emphasis added).

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argument transcript); *C & A Carbone v. Town of Clarkstown*, 1993 WL 433038, at *23 (U.S. July 16, 1993) (petitioners' brief); *see also Carbone*, 511 U.S. at 407, 114 S.Ct. 1677 (O'Connor, *J.*, concurring) (striking the ordinance under the *Pike* test, in part because "operations like petitioners' cannot comply with the requirements of both [Clarkstown and the State of New Jersey]").

United Haulers casts a blind eye to the Court's repeated reference to Clarkstown's favoritism for a single local proprietor. United Haulers contends that, read in conjunction, all three *Carbone* opinions imply a rejection of the distinction between public and private ownership for Commerce Clause purposes. The argument proceeds as follows: The dissenters in *Carbone* argued that the favored facility was an agent of the municipality and therefore publicly owned. Accordingly, the dissent argued that the ordinance did not discriminate against out-of-state business in favor of in-state business:

> While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership. . . .
>
> The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms.

See id. at 419-20, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (footnote omitted). The majority, the argument continues, although clearly aware of the dissent's contention, nonetheless held that the town may not use discriminatory regulation to earn revenues for its project. This holding, according to United Haulers, necessarily rejected the distinction between public and private ownership relied on by the dissent.

We disagree with United Haulers' reading of *Carbone*. A careful reading of the separate opinions in *Carbone* does not support United Haulers' theory. Indeed, if we were to divine direct guidance from those opinions, we would reach the opposite conclusion; namely, that in *Carbone* the Justices were

divided over the *fact of whether* the favored facility was public or private, rather than on the import of that distinction.

As noted above, the *Carbone* majority referenced the private character of the favored facility several times, *id.* at 387, 114 S.Ct. 1677 ("local private contractor"); *id.* at 392, 114 S.Ct. 1677 ("single local proprietor"); *id.* at 394, 114 S.Ct. 1677 ("to give that project an advantage over *rival businesses* from out of State" (emphasis added)). In contrast, Justice O'Connor, in her concurrence, characterized the Clarkstown scheme as a *public* monopoly, foreclosing competition from all competitors in-state and out-of-state. *See id.* at 402-03, 114 S.Ct. 1677. As such, Justice O'Connor rejected the notion that the Clarkstown ordinance should be found discriminatory and, thus, analyzed under the *Maine v. Taylor* framework. Instead, Justice O'Connor would have analyzed, and ultimately struck down, the ordinance under the *Pike* balancing test. *Id.* at 403-07, 114 S.Ct. 1677. Like Justice O'Connor, the three-justice dissent clearly articulated its view that the Clarkstown transfer station was public for dormant Commerce Clause purposes and, therefore, would have analyzed the ordinance under the *Pike* test. *See id.* at 410-30, 114 S.Ct. 1677. Unlike Justice O'Connor, however, the dissent would have upheld the ordinance. In the face of these opinions, the majority's frequent reference to the private local contractor that legally owned the transfer station and its silence regarding the distinction between public and private ownership leads us to conclude that underlying its analysis of the constitutionality of the ordinance was a finding that the favored facility was private rather than public.

Nevertheless, we require more than the Court's silence on this point before concluding that it either rejected or accepted the public/private distinction advocated by the concurring and dissenting opinions. *See Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 358-59, 112 S.Ct. 2019,

119 L.Ed.2d 139 (1992) (noting that the case did not "raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities"). As the majority in *Carbone* did not directly address the issue and its language can fairly be described as elusive on that point, we proceed to examine those "local processing" cases, upon which the Court placed heavy reliance. This examination removes any remaining doubt we may have had regarding the importance of the distinction between private and public ownership in the dormant Commerce Clause analysis of such cases. As discussed in great detail by the *Carbone* dissent, in each and every one of the local processing cases the challenged laws favored a local private business, industry or investment (not a state-owned facility or a public monopoly) to the detriment of out-of-state competitors.

b. *The Local Processing Cases*

A commonly cited example of the Court's local processing cases is *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). There, the Court struck down a city of Madison, Wisconsin ordinance that required all milk sold in the city to be pasteurized within five miles of the central portion of the city. The ordinance applied to all businesses, in-state and out-of-state. The "practical effect" of the ordinance, however, was to "erect[ ] an economic barrier protecting a *major local industry* against competition from without the State." 340 U.S. at 354, 71 S.Ct. 295 (emphasis added). The fact that out-of-state businesses could build pasteurizing facilities within the five-mile radius did not make it any less discriminatory. Requiring local investment benefitted the city at the expense of other states and municipalities. In *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 104 S.Ct. 2237, 81 L.Ed.2d 71 (1984), a four-justice plurality confirmed that export restraints undertaken to

"promot[e] employment" or investment within the state fell "within the rule of virtual *per se* invalidity." *Id.* at 100-01, 104 S.Ct. 2237. There, the Court struck down a state regulation requiring in-state processing of timber. *See id.*; *see also Hughes v. Oklahoma*, 441 U.S. 322, 338, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (striking statute that restricted the number of minnows that could be transported out-of-state); *Minnesota v. Barber*, 136 U.S. 313, 323, 10 S.Ct. 862, 34 L.Ed. 455 (1890).

Other decisions in the local processing line of cases evidence the same intent to prevent state or local governments from favoring in-state business or investment at the expense of out-of-state businesses. In *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), another milk case, the Court struck down an ordinance which erected barriers to out-of-state competition of the local milk industry by instituting a "system of minimum prices." *Id.* at 519, 55 S.Ct. 497. In *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928), the Court struck down a Louisiana statute which forbade the export of shrimp unless the heads and hulls had first been removed within the state. *Id.* at 12-14, 49 S.Ct. 1; *see Johnson v. Haydel*, 278 U.S. 16, 49 S.Ct. 6, 73 L.Ed. 155 (1928) (striking a similar Louisiana statute regarding the pre-shipment processing of oysters); *see also Toomer v. Witsell*, 334 U.S. 385, 403-07, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948) (striking down South Carolina statute that required shrimp fishermen to unload, pack and stamp their catch before shipping it to another state). The Court held these statutes discriminatory because, whether in design or effect, they benefitted the local seafood processing industry over out-of-state competition.

United Haulers asks us to focus on the Court's broadly stated prohibition against the "hoarding" of local resources that otherwise would enter the stream of interstate commerce. A

blanket prohibition against the hoarding of articles of commerce would appear to preclude the Counties' flow control scheme. However, we must interpret the Court's holdings in context, not in a vacuum. The common thread in the Court's dormant Commerce Clause jurisprudence, highlighted in the local processing cases discussed above, is that a local law discriminates against interstate commerce when it hoards local resources *in a manner* that favors local business, industry or investment over out-of-state competition. *See, e.g., College Sav. Bank v. Fl. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 685, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999) (describing the "evil" addressed by the Commerce Clause as "the prospect that States will use custom duties, exclusionary trade regulations, and other exercises of governmental power (as opposed to the expenditure of state resources) to favor their own citizens"). The majority in *Carbone* recognized this additional requirement while describing the evils of local processing laws: "Put another way, the offending local laws hoard a local resource—be it meat, shrimp, . . . milk [or garbage]—*for the benefit of local businesses that treat it.*" 511 U.S. at 392, 114 S.Ct. 1677 (emphasis added).

There is sound reason for the Court's consistent, although often unstated, recognition of the distinction between public and private ownership of favored facilities:

> Reasons other than economic protectionism are . . . more likely to explain the design and effect of an ordinance that favors a public facility. . . . An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position, then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring

> state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

Id. at 421, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (internal quotation marks and citation omitted). Not only are such regulations "less likely to be protectionist," *id.*, they are less likely to give rise to retaliation and jealousy from neighboring states. Moreover, ordinances that favor a public facility to the detriment of all private actors are equipped with a built-in check: municipal legislators are accountable to citizens, many of whose interests are likely to be aligned to some degree with the interests of private business, either as owners, employees or investors. Where the local legislation benefits local industry to the detriment of its competition, as in all of the local processing cases, this check is inadequate. Here it is not.

The principal burden of any economic inefficiency imposed by the Counties' ordinances falls on the residents of the Counties. They must pay over twice as much to dispose of their solid waste as they paid prior to the adoption of the ordinances. There is no evidence that any out-of-state business or individual is paying more for waste collection or disposal as a result of the ordinances (as was the case in *Carbone*). The plaintiffs here are local waste collection companies. While it is true that private waste processors both in-state and out-of-state are prevented by the ordinances from competing to perform and receive payment for the operations performed at the mandatory transfer station, that disadvantage does not fall more heavily on out-of-state concerns than on local ones. The out-of-state processors furthermore have not complained, and there is no indication the deprivation represents a meaningful economic loss.

> The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded

> to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect.

Id. at 430, 114 S.Ct. 1677 (Souter, *J.*, dissenting). To the extent that a state or local government risks causing inconsistent local laws or inciting retaliation among the states to the detriment of the "national market," the *Pike* test is a suitable vehicle for meaningful judicial review. 397 U.S. at 142, 90 S.Ct. 844; *see Healy v. Beer Inst.*, 491 U.S. 324, 336-37, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989) (holding that, under the *Pike* test, "the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States").

United Haulers also relies on the fact that no case has yet expressly relied on the distinction between public and private ownership, *see U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067-68 (8th Cir.2000); *Huish Detergents*, 214 F.3d at 715-16 (striking down regulation that awarded private local waste collection company franchise over County collection duties); *Waste Mgmt. v. Metro. Gov't*, 130 F.3d 731, 733-36 (6th Cir.1997); *Harvey & Harvey*, 68 F.3d at 807-09 (remanding for consideration of effects of local action awarding exclusive waste disposal contract to private local business), and that a number of appellate and district courts have implicitly rejected the distinction without discussion. *See Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1385-89 (8th Cir.1993) (striking down ordinance that required all waste generated within locality to be delivered to public waste facility); *Coastal Carting Ltd. v. Broward County*, 75 F.Supp.2d 1350, 1352 & n.1 (S.D.Fla.1999); *Randy's Sanitation v. Wright County*, 65 F.Supp.2d 1017

(D.Minn.1999); *Zenith/Kremer Waste Sys. v. W. Lake Superior Sanitary Dist.*, 1996 WL 612465, at *1-*3, *10 n. 13 (D.Minn. July 2, 1996); *Waste Recycling v. Southeast Ala. Solid Waste Disposal Auth.*, 814 F.Supp. 1566, 1570, 1577-83 (M.D.Ala.1993) (striking down flow control ordinances which required all waste to be delivered to a Public Authority landfill), *aff'd*, 29 F.3d 641 (11th Cir.1994) (unpublished table decision). Assuming that these courts were faced with pure public ownership of the favored facility, as we are here, their holdings are not binding on our determination and have little persuasive value given that the courts did not directly address the issue we decide today.

Only one case has expressly addressed and rejected the distinction. *See Southcentral Pa. Waste Haulers Ass'n*, 877 F.Supp. at 943. There, private waste haulers were required by law to deliver all solid waste to a landfill, owned and operated by the local solid waste authority, a public corporation. *Id.* at 938. The defendants, like the Counties and the Authority here, argued that *Carbone* did not apply to an ordinance that favored a publicly owned facility. *Id.* at 943. The district court, relying primarily on the Supreme Court's statements about hoarding local resources, was "not persuaded that the public nature of the Authority facility changes the applicable analysis." *Id.* (citing *Waste Sys. Corp.*, 985 F.2d at 1387, and *Waste Recycling*, 814 F.Supp. at 1578). We believe that it does change the analysis and we respectfully disagree with that decision for the reasons already discussed.

Moreover, we find ample precedential support for our conclusion in (1) the consistent underlying facts of the local processing line of cases, a line in which the majority squarely placed *Carbone*, and (2) the opinions of four Supreme Court Justices, all of whom characterized the facility in *Carbone* as publicly owned, and therefore would have analyzed the challenged ordinance under the more lenient *Pike* test. In this

case, unlike *Carbone*, there is no confusion or room for debate regarding the ownership of the favored facilities. They are owned by the Authority, a public entity, and not by any local business.

To summarize, a flow control ordinance governing the processing of waste is not discriminatory under the Commerce Clause unless it favors local private business interests over out-of-state interests. Flow control regulations like the Oneida-Herkimer ordinances, which negatively impact all private businesses alike, regardless of whether in-state or out-of-state, in favor of a publicly owned facility, are not discriminatory under the dormant Commerce Clause. The district court erred by so holding.

C. *The* Pike *Balancing Test*

Having concluded that the Counties' system does not discriminate against interstate commerce in favor of in-state business interests, we admit a temptation to undertake the *Pike* balancing test in the first instance.

This temptation, to which we do not succumb, arises from the well-settled principle that waste disposal is a traditional local government function. *See* Resource Conservation and Recovery Act, 42 U.S.C. § 6901(a)(4); N.Y. Gen. Mun. L. § 120-aa; *Carbone*, 511 U.S. at 419-20, 114 S.Ct. 1677 (Souter, *J.*, dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 956, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) ("[P]rotecting the health of its citizens—and not simply the health of its economy—is at the core of its police power."); *see also Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 320-21, 26 S.Ct. 100, 50 L.Ed. 204 (1905); *Gary D. Peake Excavating*, 93 F.3d at 76 ("Legislation pertaining to public health and safety consistently has been recognized as an important local interest.").

In the past, we have held that a municipality "has legitimate—indeed, compelling—interests that are served by its waste management program." *USA Recycling*, 66 F.3d at 1288. In *USA Recycling* we went so far as to state that "[t]he local interests that are served by consolidating garbage service in the hands of the town-safety, sanitation, reliable garbage service, cheaper service to residents-would in any event outweigh any arguable burdens placed on interstate commerce." *Id.* at 1295; *see Carbone*, 511 U.S. at 430, 114 S.Ct. 1677 (Souter, *J.*, dissenting) (arguing that any burdens on interstate commerce were "readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing"). *But see Carbone*, 511 U.S. at 407-10, 114 S.Ct. 1677 (O'Connor, *J.*, concurring). We will follow our own advice, however, and resist the temptation to rule as a matter of law prior to adequate discovery and further argument by the parties, which will undoubtedly assist the district court in this fact-intensive determination.

We do hold, however, that although it does not, in and of itself, give a municipality free reign to place burdens on the free flow of commerce between the states, the fact that a municipality is acting within its traditional purview must factor into the district court's determination of whether the local interests are substantially outweighed by the burdens on interstate commerce. With that understanding, we reverse and remand for a determination of whether the Counties' flow control laws pass constitutional muster under the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

CALABRESI, J., concurring:

I concur in both the result and the opinion. I do so because this case deals with waste processing by a publicly owned facility. Waste disposal is both typically and traditionally a local government function. With respect to such functions, the opinion's analysis of the significance of public ownership under *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994), seems to me quite right. Whether the same analysis would apply to activities that are not traditionally governmental is not before us. This case therefore does not answer the question of how such situations are to be examined in light of *Carbone*.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED HAULERS ASSOC., INC., TRANSFER SYSTEMS, INC., BLISS ENTERPRISES, INC., KEN WITTMAN SANITATION, BRISTOL TRASH REMOVAL, LEVITT'S COMMERCIAL CONTAINERS, INC. and INGERSOLL PICKUP, INC.,

Plaintiffs,

-v.-

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, COUNTY OF ONEIDA and COUNTY OF HERKIMER,

Defendants.

Civil Action No. 95-CV-516

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ROSEMARY S. POOLER, C.J.*

MEMORANDUM-DECISION AND ORDER

Plaintiffs United Haulers Association, et. al (collectively, the "Haulers") brought this lawsuit against defendants Oneida-Herkimer Solid Waste Management Authority (the "Authority") and Oneida and Herkimer counties to challenge the laws defendants enacted to manage disposal of local solid waste, known as flow control. Plaintiffs claim that the flow control laws violate the U.S. Constitution's commerce clause because they restrict interstate trade in solid waste and waste disposal services. Defendants argue that their comprehensive waste management system, of which flow control is one part, is a necessary public service.

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* Rosemary S. Pooler, United States Court of Appeals Judge for the Second Circuit, sitting by designation as a United States District Court Judge for the Northern District of New York.

BACKGROUND

During the 1980s, Oneida and Herkimer counties commissioned several professional studies and conducted a series of public and legislative hearings and debates in order to fashion a solid waste management plan. Their efforts culminated in a request to the New York state legislature to pass the Oneida-Herkimer Solid Waste Management Authority Act, which was effective on September 1, 1998. The Act created the public benefit corporation Oneida-Herkimer Solid Waste Management Authority. N.Y. Pub. Auth. L. §§ 2049-aa, et. seq. (McKinney 2000).

According to defendants, the Authority "is a public body which has functioned at all material times as an instrument of the Counties in the administration of local solid waste management policy." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 8. Specifically, the Authority has the power to collect, transport, process and dispose of solid waste; to plan, develop and construct waste management projects; to contract with Oneida and Herkimer regarding waste management; to issues regulations and set and collect fees related to waste management projects; and to borrow money and issue bonds. See N.Y. Pub. Auth. L. § 2049-ee. The Authority also has the power to enter contracts with the counties concerning, among other things, flow control, and the counties have the power to pass flow control ordinances. Id. § 2049-tt.

In May 1989 and December 1989, Oneida, Herkimer and the Authority entered contracts concerning solid waste management. Aff. of Kristin Carter Rowe, Esq., Dkt. No. 15, Exs. F & G. The contracts required the Authority to purchase or lease existing county facilities, which included an incinerator in Rome, a recycling center in Utica, and a recycling center in Ilion; to operate the existing facilities; to develop future facilities; and to issue rules and regulations concerning

facilities' operations. Oneida and Herkimer agreed to deliver "all solid waste originated or brought within their respective jurisdictions to the transfer station or stations or other facility designated by the Authority." Id. Ex. F, § 205. The May 1989 contract permitted the Authority to charge tipping and user fees to fund the purchase, construction and operation of waste management facilities. Under the December 1989 contract, the Authority agreed to issue and sell bonds to fund the study and implementation of a solid waste management plan for Oneida and Herkimer, and the counties agreed to pay any shortfall between the Authority's operating expenses and revenues. Id. Ex. G, §§ 3.03, 5.01, 5.02.

In December 1989, Oneida passed its flow control ordinance, and Herkimer followed suit in February 1990. Rowe Aff., Dkt. No. 15, Exs. B & C. In relevant part, the Oneida ordinance states that "solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the [County]." Id. Ex. B § 2(d). The Oneida law requires all haulers to obtain a permit from the Authority, and the law states that construction debris, green waste, commercial and industrial waste, and hazardous waste shall be delivered to designated facilities. Penalties for noncompliance include permit revocation, fines up to $5,000, and up to 30 days in jail. Id. Ex. B, § 12(b). The Herkimer ordinance is nearly identical to the Oneida law, although the Herkimer law caps fines at $2,000. Id. Ex. C, §§ 2(c), 13(a).

The Authority itself issued rules and regulations for its facilities, which include an ash landfill, an incinerator, a green waste compost facility, a household hazardous waste collection site, a recycling center and a transfer station. Aff. of Hans G. Arnold, Dkt. No. 25, Ex. A-7. Most importantly, the regulations state that "[h]aulers must deliver all acceptable solid waste and curbside collected recyclables generated within

Oneida and Herkimer Counties to an Authority designated facility." Id. § 8. The regulations also require all haulers to obtain and comply with permits that the Authority issues or face penalties including permit revocation, fines up to $5,000, and up to 30 days imprisonment. Id. at §§ 1, 8-9. The permits incorporate Authority regulations.

With the various contracts, local ordinances, and regulations in place, the Authority issued $42.8 million in revenue bonds in March 1990 to fund the purchase and construction of waste management facilities. Rowe Aff., Dkt. No. 15, Ex. H. The Authority issued $8.1 million in revenue bonds in November 1991 to, among other things, finance a transfer station in Utica. Id. In 1992, the Authority redeemed its outstanding bonds with proceeds from a new bond issue of $50.5 million. Id. The Authority has enforced flow control in the counties and in 1995 charged a tipping fee for solid waste of $86 per ton. Id. ¶ 23. According to plaintiffs, they could dispose of the same solid waste at various New York and out-of-state landfills at tipping fees ranging from $40 to $70 per ton.[1] See, e.g., Aff. of David N. Levitt, Dkt. No. 16, at ¶ 10; Aff. of Jeff Bliss, Dkt. No. 17, at ¶ 11. Plaintiffs estimate that the economic impact of the solid waste trade in Oneida and Herkimer counties in 1995 was approximately $30.9 million,

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[1] Defendants state that the Haulers operate pursuant to contracts they signed with individual municipalities or residents. According to defendants, these contracts "establish that plaintiffs do not absorb any of the tipping fees or other disposal costs charged by the Authority," which the Haulers pass through to their customers, and "that plaintiffs are not in fact authorized by their customers to dispose of non-recyclable waste at facilities other than those operated by the Authority." Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. These contracts are not in the record, and their relevance, if any, is limited to damages.

which is the product of 359,890 tons of waste and the $86 per ton tipping fee. See Rowe Aff., Dkt. No. 15, at ¶ 32.

Plaintiffs filed their complaint in federal court on April 14, 1995. Compl., Dkt. No. 1. In their first cause of action, the Haulers claim that defendants' flow control laws violate the Constitution's commerce clause because the laws discriminate against interstate commerce. Compl. ¶¶ 73-86. Plaintiffs seek declaratory relief and a permanent injunction preventing defendants from enforcing flow control laws. In their second cause of action, the Haulers claim damages under Section 1983, 42 U.S.C. § 1983, because defendants violated their constitutional rights. Compl. ¶¶ 87-95. The Haulers state that they suffered damages as a result of "excessive tipping and disposal fees and the costs and attorneys' fees incurred in this action." Compl. ¶ 95. Defendants filed their answers to the complaint on June 15 and 16 of 1995. Dkt. Nos. 8, 9. The parties have conducted no discovery.[2] By notice of motion, the Haulers sought summary judgment. While decision on the summary judgment motion was pending, I denied plaintiffs' motion for a temporary restraining order. See Dkt. No. 71.

DISCUSSION

I. Summary judgment standard

Summary judgment shall enter if, when viewing the evidence in the light most favorable to the nonmovant, the court determines that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 456 (1992). A party seeking summary judgment must demonstrate the absence of a genuine issue of

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[2] The magistrate judge assigned to this matter stayed discovery pending decision on the summary judgment motion. See Dkt. No. 58.

material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the movant satisfies this initial burden, then the burden shifts to the nonmovant to proffer evidence demonstrating that a trial is required because a disputed issue of fact exists. Weg. v. Macchiarola, 995 F.2d 15, 18 (2d Cir. 1993). The nonmovant must do more than present evidence that is merely colorable, conclusory, or speculative and must present "concrete evidence from which a reasonable juror could return a verdict in his favor . . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The nonmovant must do more than show "some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

II. Commerce Clause

The legal analysis required to determine whether defendants' flow control laws violate the commerce clause is well settled in light of several Second Circuit decisions following the Supreme Court's examination of the same issue in C&A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994). While the commerce clause permits Congress to act affirmatively in regulating interstate commerce, the so-called dormant commerce clause "prohibit[s] the states, in the absence of specific congressional authorization, from regulating interstate commerce." Incorporated Village of Rockville Centre v. Town of Hempstead, 196 F.3d 395, 398 (2d Cir. 1999). A state's "actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." Carbone, 511 U.S. at 389.

A. Legal Standard

The court first must decide whether the state is regulating the market or participating in it. See Sal Tinnerello & Sons v. Town of Stonington, 141 F.3d 46, 55 (2d Cir.), cert. denied, 525 U.S. 923 (1998). Participating in the market typically

means that the state is "buying or selling goods as any private economic actor might." USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1281 (2d Cir. 1995). No commerce clause violation exists in the case of market participation. See Sal Tinnerello, 141 F.3d at 55. Regulating the market generally means that a state is exercising its governmental powers in methods unavailable to private parties. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 512 (2d Cir. 1995). Classic hallmarks of government regulation are the threatened imposition of fines and/or jail terms to compel behavior. See id. If the state is regulating interstate commerce, then the court next must decide whether the regulation (1) is even-handed with only incidental effects on interstate commerce; or (2) discriminates against interstate commerce. See USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). See also Sal Tinnerello, 141 F.3d at 55.

An even-handed, or nondiscriminatory regulation has only "incidental effects on interstate commerce" and is valid "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." USA Recycling, 66 F.3d at 1281 (quotations and citations omitted). In contrast, a discriminatory regulation is "virtually per se invalid," and courts strictly scrutinize it. See Gary D. Peake Excavating Inc. v. Town Bd. of the Town of Hancock, 93 F.3d 68, 74 (2d Cir. 1996) (quotation omitted). A discriminatory regulation entails "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." USA Recycling, 66 F.3d at 1281 (quotation and citation omitted). In other words, the invalid regulation "discriminates against commerce by treating in-state interests preferentially." Sal Tinnerello, 141 F.3d at 55.

In order to prevail, plaintiffs must show either that (1) the flow control laws are discriminatory; or (2) the flow control laws place a burden on interstate commerce clearly excessive

in relation to the claimed local benefits. See USA Recycling, 66 F.3d at 1281-82. If plaintiffs prove that a regulation is discriminatory, "the burden shifts to the state or local government to show that the local benefits of the statute outweigh its discriminatory effects, and that the state or municipality lacked a nondiscriminatory alternative that could have adequately protected the relevant local interests." Id.

B. Application of standard

The local laws that Oneida and Herkimer counties enacted require all commercial haulers to deliver solid waste they collect within the counties to facilities that the counties or the Authority designate, which are the facilities that the Authority owns and operates. These flow control laws are virtually indistinguishable from the laws examined and struck down in both Carbone and SSC Corp. See Carbone, 511 U.S. at 386; see also SSC Corp., 66 F.3d at 505. As the Second Circuit recently summarized those holdings, "[t]he ordinances in Carbone and SSC Corp. were found to be discriminatory because they required all waste within the town to be disposed of at the one favored local facility, to the exclusion of out-of-state competitors." Gary D. Peake, 93 F.3d at 75. Courts have considered it almost a foregone conclusion that flow control laws violate the dormant commerce clause. See Sal Tinnerello, 141 F.3d at 56 (summarizing SSC Corp. holding striking down flow control law); Rockville Centre, 196 F.3d at 397 (noting that defendant town conceded and district court agreed that flow control ordinance was unconstitutional under Carbone); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 75 (2d Cir. 1998) (summarizing Carbone holding striking down flow control laws); USA Recycling, 66 F.3d at 1278 (noting that defendant town stopped enforcing its flow control ordinance in light of Carbone). All of these cases determined that flow control ordinances were discriminatory. I accordingly conclude that the flow control laws in Oneida and

Herkimer counties also violate the dormant commerce clause. The laws are discriminatory and per se invalid. As explained more fully below, defendants offered no evidence to meet their burden justifying the ordinances, and the Supreme Court has rejected as a matter of law the arguments they raise on this point. Summary judgment in favor of plaintiffs therefore is appropriate.

In their opposition papers, defendants argue preliminarily that plaintiffs lack standing to challenge the flow control laws because they are in the business of collecting and hauling waste rather than disposing of it. Defendants claim that plaintiffs have no legitimate expectation to take the waste to out-of-state facilities. This argument ignores the fact that the Haulers suffer injury when they pay higher tipping fees at the Authority facilities than they would at other plants. Moreover, many of the relevant cases featured haulers as plaintiffs challenging various aspects of flow control, and all of these haulers had standing in federal court. See Automated Salvage Transp., 155 F.3d at 66; Sal Tinnerello, 141 F.3d at 51; SSC Corp., 66 F.3d at 507; USA Recycling, 66 F.3d at 1279-80. Finally, as discussed in part III of this opinion, while the United Haulers Association, Inc. does not have standing to pursue a claim under 42 U.S.C. § 1983, it does have standing under the Declaratory Judgment Act cause of action. See American Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin, 46 F. Supp. 2d 143, 153 (D. Conn. 1999) (granting defendants' motion to dismiss plaintiff organization from Section 1983 cause of action but leaving intact organization's request for declaratory relief), aff'd, 2000 WL 232656 (2d Cir. Feb. 25, 2000).

Defendants argue that summary judgment is inappropriate because they are entitled to discovery regarding the discriminatory effects of flow control on interstate commerce and the lack of a nondiscriminatory alternative to flow control,

which concern their burden under the strict scrutiny test outlined above. Defendants also contend that they are entitled to discovery concerning the history of the counties' solid waste management efforts, purpose of flow control, and materials disposed of within the counties. To the extent that any factual issues exist, they are not material to my decision regarding the constitutionality of the flow control laws. The laws and regulations speak for themselves and are not disputed. The discriminatory effects of flow control also are a settled matter of law after the Supreme Court's decision in Carbone, and defendants offer no new arguments on this point. See Carbone, 511 U.S. at 391-92. The Supreme Court also rejected as a matter of law defendants' arguments that no less restrictive alternative to flow control exists or that the public benefits of the laws outweigh a burden on interstate commerce. See id. at 392-93. The remaining issues defendants raise are wholly irrelevant to my analysis. Defendants' plea for discovery therefore is unavailing.

Defendants also contend that their legislation is not like the unconstitutional flow control laws because it is an inextricable part of a public waste management system for the local management of local waste. As noted above, however, the relevant case law consistently has extracted flow control laws as an improper element of general waste management schemes. See, e.g., Rockville Centre, 196 F.3d at 397. Defendants argue that their waste management system is like the scheme that the Second Circuit approved in USA Recycling, where the town assumed exclusive responsibility for garbage collection and disposal. See USA Recycling, 66 F.3d at 1283. What defendants ignore, however, is that the defendant town in USA Recycling stopped enforcing its illegal flow control ordinance, which Oneida and Herkimer counties have not done. See id. at 1278. Nor have the counties entirely eliminated the private market for garbage collection services, which the local

government did in USA Recycling. The counties only have taken over disposal and ordered all local private haulers to purchase that service from the counties and the Authority. In other words, the counties impermissibly act "as a business selling to a captive consumer base." Id. at 1283. Defendants argue that they merely have restructured the private collection market and prohibited haulers from crossing over into the disposal market, but the flow control laws dictate where the haulers must bring local solid waste and at what price. Although defendants contend repeatedly that their system treats all parties alike with respect to disposal services, what they actually are doing is hoarding all local solid waste for the benefit of a preferred local disposal facility. See Carbone, 511 U.S. at 392. Consequently, I find based on undisputed facts that the flow control laws are unconstitutional because they discriminate against interstate commerce.

C. Remedy

Because the flow control laws violate the commerce clause, defendants are enjoined from enforcing them. The parties at this stage of the proceedings have not addressed the issue of damages, which may involve complex assessments of lost profit and lost business opportunities that the plaintiffs incurred over a period of years. Defendants contend that the Haulers passed on their increased costs from higher tipping fees to their municipal and residential customers, but there is no evidence in the record to support this claim. See Def.'s Statement of Material Facts, Dkt. No. 21, ¶ 19. I therefore refer this matter to the magistrate judge solely for assessment and calculation of damages. The magistrate judge is free to take evidence in whatever form he or she deems appropriate. I do not express any view regarding whether a limitation on damages is appropriate.

III. Section 1983

The Haulers also brought a cause of action pursuant to 42 U.S.C. § 1983, claiming that defendants deprived them of the right to freely engage in interstate commerce by enacting and enforcing flow control.[3] Defendants' primary argument regarding this claim concerns not its merits but the alleged need for discovery on the issue of plaintiffs' standing.[4]

Plaintiffs can sue local governments directly under Section 1983 "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers." Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978). Violations of the commerce clause fall within the scope of Section 1983. Dennis v. Higgins, 498 U.S. 439, 446 (1991). The commerce clause confers a right on plaintiffs "to engage in interstate trade free from restrictive state regulation." Id. at 448. Cf. Valley Disposal, Inc. v. Central Vermont Solid Waste Management Dist., 31 F.3d 89, 102 (2d Cir. 1994) (allowing plaintiffs to pursue Section 1983 claim challenging flow control

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[3] The statute provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory. . .subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

[4] Defendants also argue that the Section 1983 claim is without merit because plaintiffs failed to establish a commerce clause violation. Obviously, I disagree.

laws as violating dormant commerce clause). As noted above, defendants violated the dormant commerce clause as a matter of law when they enacted flow control laws. Defendants do not dispute that the counties and public benefit corporation Authority are state actors. Defendants do not enjoy immunity from suit because they are municipalities whose policies caused a constitutional injury. See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993).

Defendants contend only that the Haulers, specifically the United Haulers Association, Inc., failed to demonstrate standing because the association has not (1) identified its members or explained its purpose; or (2) explained the nature of its members' injuries or linked the injuries to its purposes. Although I do not adopt defendants' arguments, I agree that the association lacks standing only with respect to the Section 1983 cause of action. The Second Circuit "has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured." League of Women Voters of Nassau County v. Nassau County Bd. of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984); see also American Charities, 46 F. Supp. 2d at 152-53.[5] The association therefore may not sue under Section 1983 to secure the interstate commerce rights of its members. As noted in part II of this opinion, the association does have standing to pursue its claim under the Declaratory Judgment Act. The named plaintiffs have standing under Section 1983 because the interstate commerce rights that defendants violated are personal to these parties. Finally, plaintiffs note correctly that damages are not an element of the Section 1983 claim, and while the

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[5] Plaintiffs do not argue that they have standing under the exception that the Second Circuit identified for organizations asserting a violation of the right to associate. See League of Woman Voters, 737 F. 2d at 161.

association itself cannot collect damages, the individual named plaintiffs may. See Warth v. Seldin, 422 U.S. 490, 515-16 (1975). I refer this matter to the magistrate judge to determine what, if any, damages and attorneys' fees are warranted.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment on their first cause of action is granted and defendants are enjoined from enforcing flow control laws as described in this opinion. The United Haulers Association, Inc. lacks standing only with respect to the claim under Section 1983, but I grant the remaining plaintiffs summary judgment on that second cause of action. This matter is referred to the magistrate judge for calculation of damages, which may require the solicitation of additional evidence from the parties.

IT IS SO ORDERED.

Dated: March 31, 2000
Syracuse, New York

/s/ ROSEMARY S. POOLER
Designated District Court Judge

ONEIDA COUNTY BOARD OF LEGISLATORS

RESOLUTION NO. 301

INTRODUCED BY: MESSRS. JULIAN, HARTWELL, CREASER, HERTLINE

2ND BY: MR. KELLY

LOCAL LAW INTRODUCTORY "I" OF 1989
LOCAL LAW NO. 1 OF 1990

RE: LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, GREEN WASTE, HOUSEHOLD HAZARDOUS WASTE, FARM HAZARDOUS WASTE AND INFECTIOUS WASTE, AND FOR THE PROHIBITION OF THE DISPOSAL OF ANY WASTE MATERIALS IN ANY MANNER EXCEPT AS SET FORTH IN THE LAW.

Section 1. Definitions

As used in this local law, the following terms shall have the following meanings:

(a) "Authority" means the Oneida-Herkimer Solid Waste Management Authority.

(b) "Board" means the Oneida County Board of Legislators.

(c) "Commercial" means any person, company, partnership, municipality or other entity providing a public service or engaged in a business for profit.

(d) "Commercial and Industrial Waste" shall include all non-hazardous and non-toxic solid wastes generated by

commercial and industrial sources exclusive of commercial and industrial by-products.

(e) "Construction and Demolition Debris" means solid waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material and tree and brush stumps.

(f) "County" means the County of Oneida.

(g) "Farm Hazardous Waste" shall mean pesticides and/or pesticide residue and all containers containing the same which are or will no longer be utilized for farm purposes.

(h) "Green Waste" shall mean grass clippings, leaves, and cuttings from shrubs, hedges and trees, and garden debris.

(i) "Household Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking or serving of foods. Household garbage originates primarily in home kitchens, stores, markets, restaurants, and other places where food is stored, prepared or served.

(j) "Household Hazardous Wastes" are exempt from State and Federal regulations; for the purpose of this local law, household hazardous waste shall include pesticides, pesticide residue and all containers containing the same, used motor oil and automobile batteries.

(k) "Household Metals" shall mean any empty metal food containers including aluminum, bimetal and steel cans.

(l) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(m) "Large Household Furnishings" shall mean all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(n) "Major Appliances" shall mean a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(o) "Municipality(ies)" means any village, town or city in the County.

(p) "Person" shall mean any individual head of household, landlord, chief executive officer, owner or manager of a commercial or industrial establishment.

(q) "Recyclable Commercial and Industrial By-products" shall include all materials which are a by-product of production utilized in production or sale after sale by a commercial enterprise or industrial enterprise.

(r) "Recyclable Material(s)" means any material which, under any applicable law is not hazardous and which may be separated from the waste stream and held for its material recycling or reuse value.

(s) "Recyclables" means any material designated, from time to time, by the County or the Authority pursuant to contract with the County which, under any applicable law or regulation, is not hazardous and which is separated from the waste stream and held for its material recycling or reuse value.

(t) "Recyclers" shall mean those who deal with recyclable material, including but not limited to, collectors, separators and marketers. This definition shall include not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(u) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials

or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-product, including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste, sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-prodcut [sic] material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics of hazardous waste promulgated by the Commissioner of the Department of Environmental Conservation.

(v) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(w) "Vehicular Tires" shall mean tires from cars and trucks and their casings.

(x) The terms "solid waste", "recyclable material", "construction and demolition debris" and "major appliances" shall not be construed to include "green waste".

Section 2. Preparation of Solid Waste and Recyclables for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the County shall provide for the collection of solid waste and recyclable material. Each

municipality shall provide to the County a plan for approval to provide for such collection. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material to that municipality.

No person shall dispose of solid waste or recyclable or nonrecyclable material except as follows:

(a) In order to provide for public health and safety and to facilitate the conservation of vital resources: Each person shall provide for the removal of solid waste and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County.

(b) In order to facilitate the conservation of vital natural resources through recycling, each person shall provide for the separation of recyclables in a suitable container for recyclable material as authorized or provided by the County or by the Authority pursuant to contract with said County.

(c) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, glass, metals, corrugated cardboard, plastics, office paper and green waste shall be separated from other nonrecyclable material and placed in said container; the particular requirements for separation shall be established by the County or by the Authority pursuant to contract with the County.

(d) From the time of placement of solid waste and of recyclables at the roadside or other designated area approved by the County, or by the Authority pursuant to contract with the County, by a person for collection in accordance herewith, such solid waste and recyclables shall be delivered to the appropriate facility, entity or person responsible for disposition designated

by the County or by the Authority pursuant to contract with the Authority. It shall be a violation of this ordinance for any person without a valid permit issued by the County to commercially collect, pickup, remove or cause to be collected, picked up or removed any solid waste and/or recyclables placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of this ordinance. A resident may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(e) It shall be a violation of this ordinance for any person to place at the roadside for collection any can or container other than one which has its contents separated into solid waste and/or recyclables.

(f) Tipping fees, if necessary for the collection, handling and disposal of recyclables shall be established by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 3. Marketing of Recyclables.

(a) In order to facilitate the marketing of recyclables, the County shall request letters of interest from recyclers expressing their willingness to accept recyclables. A list of interested parties will be established by the County.

(b) Prior to the marketing of recyclables, recyclers appearing on the list will be notified and given specifications with regard to available recyclables.

(c) In the event that recyclers submit a written proposal on said recyclables, it shall be required that said proposal be delivered to the County according to the specifications set forth by the County. Overall costs, the reliability that recyclables

will be accepted by the proposer, the contract term and conditions, including recyclables specifications, for the acceptance of recyclables shall all be major factors in evaluating and awarding a contract.

(d) All marketing of recyclables collected and separated shall, where practicable, be subject to competitive bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

(e) For purposes of this Section 3, all contracts awarded on or prior to the acceptance test of the Oneida-Herkimer Materials Recovery Facility shall be effective pursuant to its terms. The acceptance test referred to in this subsection 3(e) shall be the Plant Acceptance Test conducted pursuant to Section 15600.4 as contained in Specifications for the Oneida-Herkimer Materials Recovery Facility, Contract No. 5, Contractor Bid No. H-104-C-1, Process Mechanical. After the date of the acceptance test, this Section 3 shall no longer be of any force or effect.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential, commercial and industrial, construction and demolition debris. Such debris which is recycled or reused for construction shall not be regulated by this ordinance.

(b) Said debris shall be delivered to the appropriate facility or entity or person responsible for disposition designated by the County or by the Authority pursuant to contract with the County.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction and demolition debris shall be established and modified by the Board as needed from time to time (i) upon its initiative, (ii) upon the recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 5. Preparation of Residential Green Waste and Disposal of Same.

(a) Each city, town and/or village within the County shall provide a schedule for the collection of residential green waste.

(b) Said green waste shall be composted either by the County or pursuant to contract with the Authority at a site or sites designated by the County or, as applicable, the Authority, or at sites approved by it operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of green waste.

(c) Tipping fees or other charges for the handling and disposal of residential green waste shall be established and modified by the Board as needed from time to time either upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to the contract with the Authority.

Section 6. Disposal of Commercial and Industrial Waste and Recyclables.

(a) All commercial and industrial waste collected by either municipal or private haulers shall be delivered to the appropriate facility or entity or person responsible for disposition designated by the County.

(b) All commercial and industrial recyclables collected by either municipal or private haulers and designated for processing and/or disposal at a County or Authority facility

shall be packaged and collected in a manner designated by the County or the Authority pursuant to contract with the County and delivered to a facility or entity or person responsible for its disposition designated by the County.

(c) Tipping fees or other charges for the handling and disposal of commercial and industrial waste and recyclables shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to contract with the Authority.

(d) Commercial or industrial recyclables collected by the metal industry, recyclers, and their agents, as well as the recyclable materials that they separate and market shall be exempt from this ordinance. Any waste they tender for municipal collection shall not include recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said by-products cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances and Tires.

(a) Each city, town and/or village within the County shall provide a schedule for the collection and disposal of major appliances and tires.

(b) Said major appliances and tires shall be disposed either by the County or pursuant to contract with the Authority at a site or sites designated by the County or at sites approved by the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Board as needed from time to time upon [sic]

(i) upon its initiative, (ii) upon the recommendation of the County Executive or (iii) pursuant to contract with Authority.

Section 8. Preparation of Residential Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the County or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility or entity or person responsible for disposition as the County or the Authority, pursuant to contract with the County, shall determine.

(c) Tipping fees or other charges for the handling and disposal of household hazardous waste and farm hazardous waste shall be established and modified by the Board as needed from time to time upon [sic] (i) upon its initiative, (ii) upon recommendation of the County Executive, or (iii) pursuant to contract with the Authority.

Section 9. Disposal of Infectious Waste.

(a) Commencing January 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority, pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies, partnerships, municipalities or other entities engaged in the commercial collection, pick-up, transfer, removal and/or

disposal of solid waste and/or recyclables, in the County placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit any such person, company, partnership, municipality or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 12.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company, partnership, municipalities or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables in the County as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 12.

Section 11. Prohibition Against Unauthorized Dumping.

By the adoption of this law, the Oneida County Board of Legislators also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Oneida County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Oneida County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each person shall provide the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal

location approved by the County or the Authority pursuant to contract with the County.

1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Oneida County.

5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Enforcement: Penalties.

(a) Failure to comply with this ordinance by any person or tenant in cases where a lease agreement gives specific responsibility for solid waste disposal to said tenant, shall be an offense punishable as provided.

(b) Conviction of a first offense provided by this article shall be punishable by a fine of not less than $100 and not more than $500 and/or loss of solid waste collection and disposal permit, and in addition, anyone convicted of a first offense thereunder shall be liable to pay a civil penalty of not less than

$100 and not more than $500. Conviction of a second offense within a year of the first offense shall be punishable by a fine of not less than $500 nor more than $1,000 and/or loss of solid waste collection and disposal permit, or imprisonment of not more than fifteen (15) days, or both, and in addition anyone convicted of a second offense thereunder shall be liable to pay a civil penalty of not less than $500 nor more than $1,000. Conviction of a subsequent offense within a year of the first offense shall be punishable by a fine of at least one thousand dollars ($1,000) and not more than two thousand dollars ($2,000) and/or loss of solid waste collection and disposal permit, or imprisonment of not more than thirty (30) days, or both, and in addition anyone convicted of a subsequent offense thereunder shall be liable to pay a civil penalty of one thousand dollars ($1,000). Conviction of any company, partnership, municipality or any entity other than an individual person, shall be subject to a fine of not less than $2,500 nor more than $5,000.

(c) The prosecution and enforcement of violators for any non-compliance with this law shall lie as follows: (i) Municipalities (city, town or village) in the County which provide municipal collection or contract for collection with private haulers shall prosecute and enforce such violations. (ii) To the extent municipalities do not provide for municipal collection or contract for collection with private haulers, the County shall prosecute and enforce such violations.

Section 13. Effective Date.

Upon approval of the County Executive, this local law shall be effective immediately as per the implementation schedule attached and made a part hereof as if fully set forth herein.

Section 14. Severability.

If any part of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining sections shall remain in full force and effect.

Section 15.

This Local Law shall take effective immediately and shall be the final version of all passed and present legislation for the collection and disposition of solid waste thereby repealing and rendering null and void Local Law #2 of 1989 and Local Law #1 of 1988.

APPROVED: Environmental Conservation Committee (October 25, 1989)

Laws & Rules Committee (October 31, 1989)

Ways & Means Committee (November 15, 1989)

ADOPTED BY THE FOLLOWING VOTE:

AYES 34 NAYS 0

DATED: December 13, 1989

LOCAL LAW
INTRODUCTORY NO. 1 – 1990

A LOCAL LAW FOR THE COLLECTION AND DISPOSITION OF SOLID WASTE INCLUDING GARBAGE, RECYCLABLES, CONSTRUCTION AND DEMOLITION DEBRIS, APPLIANCES, FURNISHINGS, YARD WASTE, HOUSEHOLD HAZARDOUS WASTE, AND FARM HAZARDOUS WASTE, TO SUPPLEMENT LOCAL LAW 2 FOR THE YEAR 1988 AND AMEND CERTAIN SECTIONS THEREOF

BE IT ENACTED by the Legislature of the County of Herkimer:

Section 1. Definitions

(a) "Solid Waste" means all putrescible and non-putrescible solid wastes, including, but not limited to, materials or substances discarded or rejected as being spent, useless, worthless, or in excess to the owners at the time of such discard or rejection, or are being accumulated, stored, or physically, chemically or biologically treated prior to being discarded or rejected, having served their intended use, or as a manufacturing by-products [sic], including, but not limited to, garbage, refuse, industrial, commercial and agricultural waste sludges from air or water pollution control facilities or water supply treatment facilities, rubbish, ashes, contained gaseous material, incinerator residue, demolition and construction debris and offal, but not including sewage and other highly diluted water-carried materials or substances and those in gaseous form, special nuclear or by-product material within the meaning of the Atomic Energy Act of 1954, as amended, or waste which appears on the list or satisfies the characteristics or hazardous waste promulgated by the Commissioner of Environmental Conservation.

(b) "Garbage" means putrescible solid waste, including animal and vegetable waste resulting from the handling, storage, sale, preparation, cooking and/or serving of foods.

(1) "Household Garbage" originates primarily in home kitchens.

(2) "Commercial and Industrial Garbage"originates primarily in stores, markets, restaurants and other places where food is stored, prepared, and/or served; and the term shall also include all non-hazardous and non-toxic wastes which are not commercial and industrial by-products.

(c) "Hazardous Waste" includes pesticides and containers used for pesticides, used motor oil, automobile batteries, and all other materials, determined now or in the future to be hazardous by state or federal rule, regulation and/or statute.

(1) "Household Hazardous Waste" originates primarily in the home.

(2) "Farm Hazardous Waste" originates primarily on farms and/or results from farming activities.

(3) "Commercial and Industrial Hazardous Waste" originates primarily from commercial and industrial activities.

(d) "Yard Waste" means grass clippings, leaves, cuttings and other debris from shrubs, hedges and trees. "Garbage", "Recyclable Material", and "Construction and Demolition Debris" shall not be construed to include "Yard Waste".

(e) "Construction and Demolition Debris" means waste resulting from construction, remodeling, repair and demolition of structures, road building, and land clearing. Such wastes include but are not limited to bricks, concrete and other masonry materials, soil, rock, lumber, road spoils, paving material and tree and brush stumps.

(f) "Major Appliances" means a large and/or bulky household mechanism (as a refrigerator, washer, dryer, stove, etc.) ordinarily operated by gas or electric current.

(g) "Large Household Furnishings" means all other large and/or bulky articles actually used in the home and which equip it for living (as chairs, sofas, tables, beds, carpets, etc.)

(h) "Recyclable Material" means any material designated, from time to time, by Herkimer County which, under any applicable law or regulation, is not hazardous and which is separated from the waste-stream and held for its material recycling or reuse value.

(i) "Recyclable Commercial and Industrial By-products" includes all materials which are a by-product of production utilized in production or sale by a commercial enterprise or industrial enterprise.

(j) "Recyclers" means those persons who deal with recyclable material as collectors, separators and/or marketers. This definition includes not-for-profit corporations and charitable corporations which collect recyclables for fund raising purposes.

(k) "Source Separation" means the segregation of recyclable materials from the solid waste stream at the point of generation for separate collection, sale or other disposition.

(l) "Vehicular Tires" means tires from cars, trucks, domestic, recreational and farm vehicles.

(m) "Person" means any owner or owners of residential property, individual head of household, landlord, Chief Executive Officer, school superintendent, owner or manager of a commercial or industrial establishment.

(n) "Legislature" means the Herkimer County Legislature or for the purpose of this Local Law only, a Committee of the

Legislature, or an employee or officer of the County of Herkimer designated by the Legislature to perform duties under this Local Law and/or the regulations adopted pursuant thereto.

(o) "Household Metals" shall mean any empty metal food containers including aluminum, by-metal and steel cans.

(p) "Infectious Waste" shall be as defined in 6 NYCRR Part 360 as amended.

(q) Authority shall mean the Oneida-Herkimer Solid Waste Management Authority.

Section 2. Preparation of Solid Waste and Recyclable Material for Residential Collection.

In order to provide for public health and safety and to facilitate the conservation of vital natural resources, each city, town and/or village within the county shall provide for the collection of solid waste and recyclable material. Each municipality shall provide by June 30, 1990 to the Legislature a plan for approval to provide for such collection, which plan shall include the schedules required by Sections 4(a), 5(a) and 7(a) of this Local Law. Such plan must demonstrate that regular, reliable collection of solid waste and recyclable material will be provided to each property which generates that material in that municipality. Amendments to any such plan may be filed with the County but shall not be effective until accepted and approved by the Legislature.

The Legislature shall determine the schedule of implementation for collection of recyclable material in the County. If the Legislature has designated an employee, officer or committee, as provided in this Local Law, the determination shall be subject to approval by the Legislature.

After the schedule of implementation has been imposed in an area of the County and becomes effective by its terms, no

person shall dispose of garbage or recyclable or nonrecyclable material except as follows:

(a) In order to facilitate the conservation of vital natural resources through recycling: Each person shall provide for the separation of recyclable material in a suitable container or containers as authorized by the Legislature or as approved by the County of Herkimer or the Authority contracting with said County.

(b) In order to further facilitate the conservation of vital natural resources through recycling: Discarded newspapers, emptied glass containers, household metals, corrugated cardboard, plastics, high grade office paper and yard waste shall be separated from other nonrecyclable material and placed in authorized containers. The particular requirements for separation shall be established by the Legislature, or by the Authority pursuant to contract with the County.

(c) After placement of garbage and of recyclable materials at the roadside or other designated area approved by the Legislature by a person for collection in accordance herewith, such garbage and recyclable material shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County. It shall be a violation of this Local Law for any person without authority from the Legislature to collect, pick up, remove or cause to be collected, picked up or removed any garbage or recyclable material placed at the roadside or other designated area and each such collection, picking up, or removal from one or more premises shall constitute a separate and distinct offense in violation of the Local Law. A person may dispose of their recyclables by selling or donating the same to recyclers, but these recyclables may not be picked up at the roadside.

(d) It shall be a violation of this Local Law for any person to place at the roadside or other designated area for collection

any can or container other than one which contains only garbage on [sic] recyclable material, except under regulations established by the Legislature.

(e) Tipping fees if necessary for the collection, handling and disposal of recyclables shall be established by the Legislature, or by the Authority pursuant to contract with the County.

Section 3. Public Sale of Recyclables.

(a) In order to facilitate the sale and/or marketing of recyclable material, the Legislature or the Authority pursuant to contract with the County shall request letters of interest from recyclers expressing their willingness to purchase recyclable material from the County. A list of interested parties shall be established.

(b) Prior to the sale of recyclable material, recyclers appearing on the list will be notified and given specifications with regard to available recyclable material for sale.

(c) In the event that recyclers bid on said recyclable material, it shall be required that said bid be written and delivered to the Legislature or the Authority in accordance with the specifications set forth.

In the case of awarding a bid, the highest bid price from a responsible bidder will be accepted. The Legislature and the Authority, however shall retain the right to reject all bids and authorize a rebidding.

(d) All sales and/or marketing of recyclables collected and separated shall be subject to bid. It shall be a term and condition of all bids for recyclables collected under this local law that the material purchased will be recycled and not landfilled or burned or otherwise not recycled.

Section 4. Preparation of Residential, Commercial and Industrial Construction and Demolition Debris and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of residential, commercial and industrial construction and demolition debris. Such material which is recycled or reused for construction shall not be regulated by this Local Law.

(b) Said debris shall be disposed of at the Demolition Debris Disposal Site or other suitable site as designated by the Legislature under the terms and conditions established by the Legislature.

(c) Tipping fees or other charges for the handling and disposal of residential, commercial and industrial and construction debris shall be established and modified by the Legislature as needed from time to time, or by the Authority pursuant to contract with the County.

Section 5. Preparation of Yard Waste and Disposal of the Same.

(a) Each city, town and/or village within the county shall provide a schedule for the collection of yard waste.

(b) Said yard waste shall be composted either by the County of Herkimer at a site or sites designated by the Legislature, or by the Authority pursuant to contract with the County or at sites approved by the Legislature operated by cities, towns or villages. Where allowed by law or regulation, this section shall not prohibit private composting of yard waste.

(c) Tipping fees or other charges for the handling and disposal of residential yard waste shall be established and modified by the Legislature as needed from time to time.

Section 6. Disposal of Commercial and Industrial Garbage and Recyclables.

(a) All commercial and industrial waste collected by either municipal haulers or private haulers shall be delivered to the appropriate facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(b) All commercial and industrial recyclables designated for disposal at a County facility shall be packaged and collected in a manner designated by the Legislature, and delivered to a facility designated by the Legislature, or by the Authority pursuant to contract with the County.

(c) Tipping fees and other charges for the handling and disposal of commercial and industrial garbage and recyclables shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

(d) The materials collected by the metal industry and Recyclable Commercial and Industrial by-Products collected by recyclers shall be exempt from this Local Law. Any waste tendered for municipal collection by commercial and industrial enterprises shall not include such recyclables.

(e) Recyclable industrial and commercial by-products may be sold or donated by an industrial and/or commercial enterprise to any scrap metal enterprise or recycler. However, said materials cannot be placed at the curbside for collection by said scrap metal enterprise or recycler.

Section 7. Disposal of Major Appliances, Large Household Furnishings and Vehicular Tires

(a) Each city, town and/or village within the county shall provide a schedule for the collection of and disposal of major appliances, large household furnishings and vehicular tires.

(b) Said major appliances, large household furnishings and vehicular tires shall be disposed of by delivery to a site or sites designated by the Legislature or at sites approved by the Legislature, or by the Authority pursuant to contract with the County operated by city, towns or villages.

(c) Tipping fees or other charges for the handling and disposal of major appliances and tires shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County as needed from time to time.

Section 8. Preparation of Household Hazardous Waste for Collection and Disposal of the Same.

(a) All household hazardous waste and farm hazardous waste shall be placed in a container determined by the Legislature, or the Authority pursuant to contract with the County.

(b) Household hazardous waste and farm hazardous waste shall be delivered to such facility as the Legislature, or the Authority pursuant to contract with the County shall designate.

(c) Tipping fees or other charges for the handling and disposal of residential hazardous waste shall be established and modified by the Legislature, or by the Authority pursuant to contract with the County[,] as needed from time to time.

Section 9. Disposal of Infectious Waste

(a) Commencing January 1, 1990 to March 1, 1990, all infectious waste as defined and regulated by Title 6 of the official compilation of Codes, Rules and Regulations of the State of New York (NYCRR) Part 360, shall be disposed of at a location designated by the County or by the Authority pursuant to a contract with the County and by a method specified and approved by the County or the Authority,

pursuant to contract with the County, and in compliance with all applicable State laws and regulations.

Section 10. Solid Waste Collection and Disposal Permit.

(a) Commencing January 1, 1990, all persons, companies or other [sic] engaged in the commercial collection, pick-up, transfer, removal and/or disposal of solid waste and/or recyclables, placed at the roadside or other designated location and as defined in this law shall obtain a permit issued by the County or by the Authority pursuant to contract with the County. Failure to obtain such permit shall prohibit a person, company or other entity from conducting such activities within the County. Failure to comply with this Subsection 10(a) shall subject the violator to the penalties set forth in Section 13.

(b) Failure to comply with the conditions and requirements of a permit issued pursuant to Section 10(a) hereof shall subject such person, company or entity to a revocation of such permit and revocation of all rights and privileges to collect, pick up, transfer, remove or dispose of solid waste or recyclables as defined herein, and further such failure to comply with this Subsection 10(b) shall subject the violator to the penalties set forth in Section 13.

Section 11. Prohibition Against Unauthorized Dumping.

By adoption of this law, the Herkimer County Legislature also declares its intent to regulate the throwing, dumping, depositing and placing of solid waste and recyclable material on lands within Herkimer County. This ordinance shall apply to throwing, dumping, depositing and placing of solid waste and recyclable material upon all lands, public or private, within Herkimer County and thereon only in the manner herein provided:

(a) In order to provide for public health and safety and to facilitate the conservation of vital natural resources: each

person shall provide for the removal of garbage and recyclables from the property on which they are generated either through a service provided by a municipality or licensed private hauler or by direct haul by the individual generator to a disposal location approved by the County or the Authority pursuant to contract with the County.

(1) It shall be a violation of this law for any person to place for the purpose of collection solid waste and/or recyclables at a property other than the property generating said material.

(2) It shall be a violation of this law for any person to place solid waste and/or recyclable material in dumpsters and/or containers designated for solid waste use by commercial and/or industrial establishments.

(3) It shall be a violation of this law for any person to bury and/or burn solid waste material on public or private property.

(4) It shall be a violation of this law for any person to throw, dump, deposit or place solid waste and/or recyclable material along the roadside or on public and/or private property within Herkimer County.

(5) It shall be a violation of this law for any person to cause to be thrown, dumped, deposited, or placed solid waste and/or recyclable material along any public or private road or on lands bordering such roads.

Section 12. Rules and Regulations.

(a) Rules and regulations imposed for the purpose of implementing the provisions of this Local Law shall be adopted or approved by the Herkimer County Legislature.

(b) Before adopting or approving such rules and regulations the Committee on Solid Waste of the Herkimer

County Legislature, or such other committee as shall be designated, shall hold a public hearing upon at least five (5) days notice to consider the proposed rules and regulations. Such notice shall be published one time in the official newspapers of the County and mailed by regular mail to the supervisors of all the towns and the mayors of the city and villages in the County.

(c) Said rules and regulations shall not become effective until ten (10) days after adoption or approval by the Herkimer County Legislature. During such ten (10) day period the Legislature shall, by such means it deems proper, publicize the said rules and regulations.

Section 13. Enforcement: Penalties

(a) Any person who violates any provision of this Local Law, or any rule or regulation issued pursuant thereto, which has been approved by the Legislature, shall be guilty of an offense punishable, by a fine of One Hundred to Five Hundred Dollars ($100.00-500.00), and in addition thereto, shall be liable to pay a civil penalty of Two Hundred Fifty to Five Hundred Dollars ($250.00-500.00); for a second violation within one year of the first violation shall be guilty of an offense punishable by a fine of Five Hundred to One Thousand Dollars ($500.00-1,000.00), or by imprisonment for up to Fifteen (15) days, or both, and in addition thereto, shall be liable to pay a civil penalty of Five Hundred to One Thousand Dollars ($500.00-$1,000); for a third and each subsequent violation shall be guilty of a misdemeanor punishable by a fine of not less than One Thousand Dollars ($1,000.00), or more than Two Thousand Dollars ($2,000.00), or by imprisonment for up to Thirty (30) days, or both, and in addition thereto, shall be liable to pay a civil penalty of One Thousand Dollars ($1,000.00) to Two Thousand Dollars ($2,000.00). Each violation shall be a separate and distinct offense and, in the case

of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct violation. Corporations, companies, partnerships and municipalities shall be subject to the monetary fines and civil penalties set forth above.

(b) The prosecution and enforcement of violations for any non-compliance with this law shall lie as follows: Municipalities (city, town or village) in the County which provide municipal collection of solid waste or any type thereof or contract for such collection with private haulers shall prosecute such violations. If municipalities neglect or refuse to prosecute such violations or if municipalities do not provide for collection or contract for collection with private haulers, the County shall prosecute such violators.

(c) In the event that a person shall be found guilty of violating this Local Law he shall be liable for civil penalties as set forth in subparagraph (a) above and also for further civil penalties in the amount of reasonable attorneys fees, costs of expert witnesses, costs of testing if and when necessary for prosecution and other reasonable and necessary costs associated with the prosecution of the action.

(d) The County Attorney is authorized to commence an action in any court of competent jurisdiction to adjoin any violation of this Local Law when directed by the Herkimer County Legislature.

Section 14. Implementation.

(a) The County of Herkimer shall cause to be drawn up an implementation schedule or schedules which shall list all portions of this Local Law previously implemented and all portions thereof which remain to be implemented. Such schedule or schedules shall be mailed by certified mail return receipt requested to each municipality, addressed to the clerk of

the governing board of the municipality. Said schedule or schedules shall be effective upon the date of such mailing.

Section 15. Severability.

If any part or section of this ordinance is found to be illegal by a court of competent jurisdiction, the remaining parts or sections shall remain in full force and effect.

Section 16. Effective Date:

(a) This Local Law shall take effect immediately.